Morton, William Thomas Green

DISCOVERY OF ETHERIZATION.

BRIEF

EMBRACING

THE LEGAL POINTS

OF

DR. MORTON'S CASE.

The PRACTICAL QUESTIONS, of strict right, are—

1. Is this discovery legally private property, and to whom does it belong?

2. Has the Government of the United States appropriated, and is it now appropriating, this private property to the public use, without just compensation?

3. Ought such compensation to be now made for the past, and the right for the future to be now purchased?

4. How much ought to be appropriated for this purpose!

These questions concern strict obligation only.

The questions addressing themselves to the equity and sound policy of Congress, are—

1. Is this a case in which this party is entitled to an honorable and munificent national reward?

2. Is it a case in which, from its peculiar circumstances, the policy of the Patent laws has been defeated, so that the discoverer has reaped no fruit, but only suffered losses, from a discovery conferring inexpressible benefits upon the country and the world? Has the Government itself contributed to this result? Is the patent practically valueless to the discoverer: and ought Congress to reward him liberally, and, by pro-

curing the surrender of the patent, give to the public a just title to the discovery?

These latter questions, addressing themselves to the discretion and liberality of Congress, naturally involve an inquiry into the title of Dr. Morton to the *original merit of the discovery:* a title which is demonstrable.

The former questions, as will be seen, are entirely independent of that inquiry; for it is undisputed that Dr. Morton holds not only his own original right, but, by express assignment, all claim which Dr. Jackson could have had in any view of the facts.

1. Is this discovery legally and strictly private property? and to whom does it belong?

So far as the Government is concerned it is sufficient to say, that in pursuance of the general law, it has recognized it as private property; has issued its patent to Dr. Morton; and has received a valuable consideration from him therefor.

REPORT, p. 81.

The party contesting his right to the exclusive merit of the discovery (Dr. Jackson) assigned all right which he might have to participate in the patent, for a valuable consideration, to Dr. Morton, and requested that the patent might issue solely to him.

REPORT, p. 81.

If the question of *patentability* can fairly be raised by the Government itself which issued the patent, that question is treated by Mr. Keller, an eminent patent solicitor, and for many years a scientific examiner in the Patent Office.

Report: Appendix, p. 92, 93, note.

See also opinions of Mr. Webster and Mr. Carlisle, ad idem.

See also, Curtis on Patents. where the subject is treated in general, with reference to adjudicated cases.

The right to use this discovery, which is, therefore, in strict law, *private property:* as much so as land patented to a purchaser. The sole owner is Dr. Morton.

2. Has the Government of the United States appropriated, and is it now appropriating, this private property to public use, without just compensation?

If so, it is the express injunction of the Constitution that just compensation shall be made:

"*Private property shall not be taken for public use without just compensation.*"

As to the fact of public use, in the Army and Navy, by authority and direction of the Executive Government,

See letter of Surgeon General of Army, Report, pp. 82, 83, 84.
Of Army Surgeons Heiskill, Coolidge, Wither spoon, &c., p. 84 *and seq.*
Chief of Bureau of Medicine and Surgery, pp. 86, 87. *Again, pp.* 98, 99.
Navy Surgeon Addison, pp. 87, 88.
Army Surgeon Cuyler, p. 100.
" " *Abadie, p.* 100.
" " *Simons, p.* 101.
" " *Hill, p.* 101.
" " *Murray, p.* 101.
" " *Edwards, p.* 102.
" " *Wester, p.* 102.
" " *Porter, p.* 102.
And forty or fifty other Surgeons and Assistant Surgeons of Army and Navy, to page 107.
See also note, p. 95, *Report.*

That Dr. Morton has received any compensation for this is not pretended. The Army and the Navy, almost from the date of the patent, have had the inestimable benefits of a discovery which the laws declare to be his private property: and the Government has paid nothing for that property. It is now indispensable to the public service.

3. *Ought compensation now to be made?*

The question is answered by the voice of common honesty, not less distinctly than by the express injunction of the Constitution.

For precedents, see Report, pp. 81, 82, 97.

4. How much ought to be appropriated for this purpose?

This question may be answered by putting another: If this discovery existed practically in the exclusive possession of Dr. Morton, (as in theory of law it is,) what would Congress not give to procure it for the Army and Navy? Would not the whole country cry out shame, if it should hesitate to purchase it at the price of $100,000, or, indeed, at any price within the ordinary scale of value of human possessions?

See the estimate put on it by the Committee H. R., Report, p. 91.

The resolution of the Committee Naval Affairs H. R., Appendix, pp. 92, 93, 94.

Letters of Secretaries of Treasury and War, and Chief of Bureau of Medicine and Surgery, pp. 95, 96, 97, 98, 99.

But, over and above strict right, and positive obligation:

Is this a case in which this party is entitled to an honorable and munificent national reward? No liberal mind will deny it, if in fact the world owes this great boon *to this party:* if besides his *right of property*, he has the *merit of the discovery.*

The whole civilized world hails the discovery as the greatest physical blessing to humanity. America has given it to mankind. Our country owes this honor, this noble conscousness of having created a new era in the condition of human beings, to one of its citizens, to whom alone this universal blessing has proved a personal calamity. Is it not an occasion which appeals to

the national pride, the national liberality, the national munificence!

But the honor of the discovery is disputed by Dr. Jackson.

The great mass of testimony bearing upon this point is analyzed in a masterly manner in the Report. No mere brief can do it justice. But a few striking and controlling points must satisfy every candid mind.

1. The world received this great fact from the hands of Dr. Morton alone.

Report, pp. 9, 28, 29, 30.
Certificate of Dr. John C. Warren, p. 31.
Extract, Records of Mass. Hospital, pp. 32, 33.
Remarks of Committee, p. 33.

The verification of the fact first made by Dr. Morton, 30th September, 1846.

Report, p. 28.

Operations at Massachusetts Hospital, beginning in October, and attracting great public attention and discussion, (*Report, ubi supra*): public advertisements by Dr. Morton, (*Rep. p.* 63, *and notes to pp.* 64, 65, 66.) Yet *Dr. Jackson's first appearance in giving any countenance to the discovery was not until* JANUARY, 1847.

Report, pp. 33, 34.

He exercised no superintendence over the experiments, assumed no responsibility: did not even go to the Hospital for more than two months after ether was in regular use in that institution.

Dr. Bigelow's testimony, Rep., pp. 67, 68, 69.
Remarks of Committee, p. 71; *same, p.* 52.

Dr. Jackson's claim was originally made by himself for a fee of $500 for information given to Dr. Morton in aid of his researches.

See Report, pp. 52, 53, 54.

2. Dr. Jackson himself is clearly proven to have declared to Caleb Eddy, Esq., on 23d October, 1846, that

he *did not know*, prior to Dr. Morton's successful experiment, that "*after a person had inhaled ether, and was asleep, his flesh could be cut with a knife without* his experiencing any pain." "That *Morton was a reckless* man, and *would kill somebody* yet," &c.

Report, pp. 26, 27.

And (at same page) Hon. E. Warren testifies that Dr. Jackson TOLD HIM that "THE SO CALLED DISCOVERY WAS NOT HIS; but that MORTON WAS RESPONSIBLE FOR IT." "*That the new use of ether was dangerous, &c.;* THAT HE JACKSON WAS NOT *answerable for the results*," *&c., &c.*

3. All the facts were deliberately and impartially examined at a time when, and a place where there was every facility for such an investigation by the Trustees of the Massachusetts General Hospital; and, at the request of Dr. Jackson, an investigation was had, and on both occasions the honor and merit of the discovery was awarded to Dr. Morton.

See Hospital Reports.

4. The same investigation has been twice had, with the aid of counsel on both sides, by two committees of the House of Representatives, and on both occasions the honor and merit of the discovery were awarded to Dr. Morton.

See Reports of House of Representatives.

5. If it be necessary under these circumstances, to go into a minute examination of the testimony, reference is made to the testimony of

Wightman and Metcalf, pp. 23, 24, *proving experiments by Dr. Morton in July, &c.*, 1846.

Dana and Hayden, pp. 21, 22, *that Morton entered into a contract in June, with Hayden, to take charge of his business, so as to leave him at liberty to prosecute his experiments.*

Hayden, p. 22, *that in June,* 1846, *Morton told*

him that what he was engaged upon was this discovery.

Whitman, Leavett, Spear, and Haden, as to experiments from June down to 30th September, the day of the complete verification.

6. Dr. Jackson claims to have made this discovery in 1841. This claim is utterly irreconcilable with his conduct for five years after the pretended discovery. If he really had made the discovery, he deserves the execration of mankind for taking no single step to give it to the world. A critical examination of his pretensions is proved in the report at page 33, &c.

See pages 46, 47, 48, 49, 50.

That the peculiar circumstances of the case have defeated the operation of the patent laws, is apparent. Dr. Morton has only suffered losses and vexations from this discovery. The Government itself has actively contributed to this result, by openly using the discovery without the license of the patentee.

See Report, pp. 93, 94, *letters of Dr. Bissell and others and note, and p.* 99, *Dr. Harris.*

The patent is partially valueless. But the right is undeniable. The most obvious considerations of justice and policy dictate the procuring the surrender of the patent, and the conferring it, as a useful possession, upon the public.